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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
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11 TAMMARA THOMPSON,  
12 Plaintiff,

13 v.

14 CAROLYN W. COLVIN, Acting  
15 Commissioner of Social Security  
16 Administration,  
17 Defendant.

Case No. ED CV 13-1851-SP

MEMORANDUM OPINION AND  
ORDER

18  
19 I.

20 **INTRODUCTION**

21 On October 21, 2013, plaintiff Tammara Thompson filed a complaint  
22 against the Commissioner of the Social Security Administration  
23 (“Commissioner”), seeking a review of a denial of supplemental security income  
24 (“SSI”). Both plaintiff and defendant have consented to proceed for all purposes  
25 before the assigned Magistrate Judge pursuant to 28 U.S.C. § 636(c). The court  
26 deems the matter suitable for adjudication without oral argument.

27 Plaintiff presents one disputed issue for decision, whether the  
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Administrative Law Judge (“ALJ”) erred at step five of the sequential evaluation process by failing to identify and explain inconsistencies between the vocational expert’s testimony and the Dictionary of Occupational Titles (“DOT”). Memorandum in Support of Complaint (“P. Mem.”) at 5-16; Memorandum in Support of Defendant’s Answer (“D. Mem.”) at 2-8.

Having carefully studied, *inter alia*, the parties’ moving papers, the Administrative Record (“AR”), and the decision of the ALJ, the court concludes that, as detailed herein, the ALJ did not err at step five. Consequently, the court affirms the decision of the Commissioner denying benefits.

## II.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Plaintiff was thirty-seven years old on June 14, 2002, the alleged onset date of disability.<sup>1</sup> AR at 159. She has a high school diploma and past relevant work as a playground monitor, sales person, and laborer – stores. *Id.* at 33, 49, 218.

On September 10, 2010, plaintiff filed an application for SSI, alleging an onset date of June 14, 2002 due to fibromyalgia, degenerative disc disease, arthritis, asthma, depression.<sup>2</sup> *Id.* at 159, 172. The Commissioner denied plaintiff’s application initially and upon reconsideration, after which she filed a request for a hearing. *Id.* at 104-15, 117-18.

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<sup>1</sup> The record indicates there are two possible dates for the alleged onset of disability, January 1, 1989 or June 14, 2002. *See* AR at 159, 168. Although the ALJ relied on the January 1, 1989 date, it appear that the June 4, 2002 date is more accurate because plaintiff stopped working on June 14, 2002. *See* AR at 172.

<sup>2</sup> This was plaintiff’s fifth application for SSI and/or disability insurance benefits and a period of disability. *See* AR at 76. The fourth application was denied after a hearing. *See id.* at 76-89. Although the ALJ states that plaintiff “has not rebutted the presumption of continuing non-disability” (*id.* at 23), this appears to be an error as the ALJ did not apply the presumption and clearly found changed circumstances in the instant decision. *Compare id.* at 23-35 and 76-89.

1 On June 7, 2012, plaintiff, represented by counsel, appeared and testified  
2 before the ALJ. *Id.* at 45-72. Tony Scott, a vocational expert (“VE”), also  
3 provided testimony. *Id.* at 65-71. On June 29, 2012, the ALJ denied plaintiff’s  
4 claim for benefits. *Id.* at 23-35.

5 Applying the well-known five-step sequential evaluation process, the ALJ  
6 found, at step one, that plaintiff had not engaged in substantial gainful activity  
7 since September 10, 2010, the application date. *Id.* at 25.

8 At step two, the ALJ found that plaintiff suffered from the following severe  
9 impairments: asthma, obesity, degenerative disc disease, and depression. *Id.*

10 At step three, the ALJ found that plaintiff’s impairments, whether  
11 individually or in combination, did not meet or medically equal one of the listed  
12 impairments set forth in 20 C.F.R. part 404, Subpart P, Appendix 1 (the  
13 “Listings”). *Id.*

14 The ALJ then assessed plaintiff’s residual functional capacity (“RFC”),<sup>3</sup> and  
15 determined she had the RFC to perform a limited range of light work, with the  
16 limitations that plaintiff: could lift/carry twenty pounds occasionally and ten  
17 pounds frequently; could stand/walk two hours out of an eight-hour workday;  
18 could occasionally bend, kneel, stoop, crawl, and crouch; could not perform work  
19 requiring hypervigilance or fast-paced work such as a rapid assembly line work;  
20 could not work in an area that has more air pollutants than found in an air  
21 conditioned work environment; and could not perform complex tasks. *Id.* at 26-  
22 27. The ALJ also found that plaintiff had no restrictions with regard to sitting and  
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24 <sup>3</sup> Residual functional capacity is what a claimant can do despite existing  
25 exertional and nonexertional limitations. *Cooper v. Sullivan*, 880 F.2d 1152,  
26 1155-56 n.5-7 (9th Cir. 1989). “Between steps three and four of the five-step  
27 evaluation, the ALJ must proceed to an intermediate step in which the ALJ  
28 assesses the claimant’s residual functional capacity.” *Massachi v. Astrue*, 486  
F.3d 1149, 1151 n.2 (9th Cir. 2007).

1 would miss work once a month. *Id.* at 26.

2 The ALJ found, at step four, that plaintiff was unable to perform her past  
3 relevant work as a playground monitor, sales person, or laborer – stores. *Id.* at 33.

4 At step five, the ALJ determined that given plaintiff’s age, education, work  
5 experience, and RFC, there were jobs that exist in significant numbers in the  
6 national economy that plaintiff could perform, including electronics worker and  
7 mail clerk. *Id.* at 33-34. Consequently, the ALJ concluded that plaintiff did not  
8 suffer from a disability as defined by the Social Security Act. *Id.* at 34.

9 Plaintiff filed a timely request for review of the ALJ’s decision, which was  
10 denied by the Appeals Council. *Id.* at 1-4. The ALJ’s decision stands as the final  
11 decision of the Commissioner.

### 12 III.

#### 13 STANDARD OF REVIEW

14 This court is empowered to review decisions by the Commissioner to deny  
15 benefits. 42 U.S.C. § 405(g). The findings and decision of the Social Security  
16 Administration must be upheld if they are free of legal error and supported by  
17 substantial evidence. *Mayes v. Massanari*, 276 F.3d 453, 458-59 (9th Cir. 2001)  
18 (as amended). But if the court determines that the ALJ’s findings are based on  
19 legal error or are not supported by substantial evidence in the record, the court  
20 may reject the findings and set aside the decision to deny benefits. *Aukland v.*  
21 *Massanari*, 257 F.3d 1033, 1035 (9th Cir. 2001); *Tonapetyan v. Halter*, 242 F.3d  
22 1144, 1147 (9th Cir. 2001).

23 “Substantial evidence is more than a mere scintilla, but less than a  
24 preponderance.” *Aukland*, 257 F.3d at 1035. Substantial evidence is such  
25 “relevant evidence which a reasonable person might accept as adequate to support  
26 a conclusion.” *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998); *Mayes*, 276  
27 F.3d at 459. To determine whether substantial evidence supports the ALJ’s  
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1 finding, the reviewing court must review the administrative record as a whole,  
 2 “weighing both the evidence that supports and the evidence that detracts from the  
 3 ALJ’s conclusion.” *Mayes*, 276 F.3d at 459. The ALJ’s decision “cannot be  
 4 affirmed simply by isolating a specific quantum of supporting evidence.”  
 5 *Aukland*, 257 F.3d at 1035 (quoting *Sousa v. Callahan*, 143 F.3d 1240, 1243 (9th  
 6 Cir. 1998)). If the evidence can reasonably support either affirming or reversing  
 7 the ALJ’s decision, the reviewing court “may not substitute its judgment for that  
 8 of the ALJ.” *Id.* (quoting *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir.  
 9 1992)).

#### 10 IV.

#### 11 DISCUSSION

12 Plaintiff contends that the ALJ erred at step five because he improperly  
 13 relied on the testimony of the VE, who identified jobs that exceeded plaintiff’s  
 14 RFC. P. Mem. at 5-16. Specifically, plaintiff alleges that the ALJ erred by failing  
 15 to identify and explain three inconsistencies between the VE’s testimony and the  
 16 DOT. *Id.*

17 At step five, the burden shifts to the Commissioner to show that the  
 18 claimant retains the ability to perform other gainful activity. *Lounsbury v.*  
 19 *Barnhart*, 468 F.3d 1111, 1114 (9th Cir. 2006). To support a finding that a  
 20 claimant is not disabled at step five, the Commissioner must provide evidence  
 21 demonstrating that other work exists in significant numbers in the national  
 22 economy that the claimant can perform, given his or her age, education, work  
 23 experience, and RFC. 20 C.F.R. § 416.912(f).

24 ALJs routinely rely on the DOT “in evaluating whether the claimant is able  
 25 to perform other work in the national economy.” *Terry v. Sullivan*, 903 F.2d 1273,  
 26 1276 (9th Cir. 1990) (citations omitted); *see also* 20 C.F.R. § 416.966(d)(1) (DOT  
 27 is source of reliable job information). The DOT is the rebuttable presumptive  
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1 authority on job classifications. *Johnson v. Shalala*, 60 F.3d 1428, 1435 (9th Cir.  
 2 1995). An ALJ may not rely on a VE's testimony regarding the requirements of a  
 3 particular job without first inquiring whether the testimony conflicts with the  
 4 DOT, and if so, the reasons therefor. *Massachi*, 486 F.3d at 1152-53 (citing Social  
 5 Security Ruling ("SSR") 00-4p).<sup>4</sup> But failure to so inquire can be deemed  
 6 harmless error where there is no apparent conflict or the VE provides sufficient  
 7 support to justify deviation from the DOT. *Id.* at 1154 n.19.

8 In order for an ALJ to accept a VE's testimony that contradicts the DOT, the  
 9 record must contain "persuasive evidence to support the deviation." *Id.* at 1153  
 10 (quoting *Johnson*, 60 F.3d at 1435). Evidence sufficient to permit such a  
 11 deviation may be either specific findings of fact regarding the claimant's residual  
 12 functionality, or inferences drawn from the context of the expert's testimony.  
 13 *Light v. Soc. Sec. Admin.*, 119 F.3d 789, 793 (9th Cir. 1997) (citations omitted).

14 Here, the ALJ, as required, asked the VE whether his testimony was  
 15 consistent with the DOT, to which the VE replied that it was. AR at 68. Although  
 16 the ALJ fulfilled his initial obligation to inquire whether the VE's testimony  
 17 conflicted with the DOT, that was not the end of the ALJ's obligations. Even  
 18 where a VE wrongly testifies that there is no conflict, where "evidence from a VE  
 19 'appears to conflict with the DOT,' SSR 00-4p requires further inquiry: an ALJ  
 20 must obtain 'a reasonable explanation for the apparent conflict.'" *Overman v.*  
 21 *Astrue*, 546 F.3d 456, 463 (7th Cir. 2008) (quoting SSR 00-4p). Where the ALJ  
 22 fails to obtain an explanation for and resolve an apparent conflict – even where the  
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24 <sup>4</sup> "The Commissioner issues Social Security Rulings to clarify the Act's  
 25 implementing regulations and the agency's policies. SSRs are binding on all  
 26 components of the SSA. SSRs do not have the force of law. However, because  
 27 they represent the Commissioner's interpretation of the agency's regulations, we  
 28 give them some deference. We will not defer to SSRs if they are inconsistent with  
 the statute or regulations." *Holohan v. Massanari*, 246 F.3d 1195, 1203 n.1 (9th  
 Cir. 2001) (internal citations omitted).

1 VE did not identify the conflict – the ALJ errs. *See Hernandez v. Astrue*, 2011  
 2 WL 223595, at \*2-5 (C.D. Cal. Jan. 21, 2011) (where VE incorrectly testified  
 3 there was no conflict between her testimony and DOT, ALJ erred in relying on  
 4 VE’s testimony and failing to acknowledge or reconcile the conflict); *Mkhitarian*  
 5 *v. Astrue*, 2010 WL 1752162, at \*3 (C.D. Cal. Apr. 27, 2010) (“Because the ALJ  
 6 incorrectly adopted the VE’s conclusion that there was no apparent conflict, . . .  
 7 the ALJ provided no explanation for the deviation” and “therefore committed legal  
 8 error warranting remand.”).

9 **A. The ALJ Did Not Err at Step Five With Respect to Plaintiff’s Non-**  
 10 **Exertional Limitations**

11 Plaintiff argues the ALJ erred at step five when he concluded that she could  
 12 perform the jobs of electronics worker and mail clerk. P. Mem. at 10-14. He  
 13 contends that both of these jobs are inconsistent with plaintiff’s RFC.

14 **1. Electronics Worker**

15 In determining plaintiff’s RFC, the ALJ found, inter alia, she cannot work in  
 16 an area that has more air pollutants than found in an air conditioned work  
 17 environment. AR at 26-27. Plaintiff argues that the job of electronics worker  
 18 requires her to work with, among other things, solvents, that this is incompatible  
 19 with her limitation on exposure to air pollutants, and that the ALJ failed to identify  
 20 and explain the apparent conflict. *Id.* at 10-11.

21 Defendant characterizes the conflict between the VE’s testimony and the  
 22 DOT as “purely speculative.” D. Mem. at 3. Defendant argues that plaintiff  
 23 cannot equate the potential for occasional work with chemicals to exposure to air  
 24 pollutants, which falls under the category of “atmospheric conditions,” not “toxic  
 25 caustic chemicals.” *Id.* The court agrees.

26 The Selected Characteristics of Occupations defines “atmospheric  
 27 conditions” as “[e]xposure to conditions such as fumes, noxious odors, dusts,  
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mists, gases, and poor ventilation, that affect the respiratory system, eyes, or the skin,” and “exposure to toxic, caustic chemicals” as “[e]xposure to possibly bodily injury from toxic or caustic chemicals.” The DOT clearly states that while an electronics worker may have occasional exposure to “toxic, caustic chemicals,” “atmospheric conditions” are not present for the job. DOT 726.687-010. Therefore, there was no apparent conflict between the VE’s testimony and the DOT, and the ALJ was not required to obtain further testimony from the VE. The VE’s testimony constituted substantial evidence to support the VE’s finding that plaintiff could perform the job of electronics worker.<sup>5</sup>

## 2. Mail Clerk

Plaintiff also complains that the ALJ erred at step five when he concluded that she could perform the job of mail clerk. P. Mem. at 11-14. Specifically, plaintiff argues that the job requires a reasoning level of three, which is incompatible with her preclusion from complex tasks, and the ALJ failed to identify and explain the apparent conflict. *Id.* As discussed above, the VE stated that his testimony was consistent with the DOT, and the ALJ relied on the VE’s testimony. AR at 68. The question is whether the VE incorrectly testified there was no conflict, and the ALJ improperly relied on the testimony in the face of

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<sup>5</sup> The court notes there may be a conflict between the VE’s testimony and the DOT with regard to exposure to toxic chemicals. The ALJ determined that plaintiff could not perform work requiring hypervigilence. *See* AR at 26. Other courts in this district have found that the job of electronics worker, which entails exposure to toxic caustic chemicals, conflicts with the limitation to no work requiring hypervigilence. *See, e.g., Norris v. Colvin*, 2013 WL 3676661, at \*3 (C.D. Cal. Jul. 11, 2013); *Oviatt v. Astrue*, 2012 WL 680347, at \*5 (C. D. Cal. Feb. 29, 2012). But as plaintiff does not raise this argument it is waived. *See Greger v. Barhart*, 464 F.3d 968, 973 (9th Cir. 2006) (arguments not raised before the District Court are generally waived). And in any event, because as discussed below plaintiff can perform the job of mail clerk, any error in finding she can also perform the job of electronics worker was harmless.



1 evidence of an apparent conflict.

2 Each DOT job description includes general educational development  
3 (“GED”) scales for reasoning, language, and mathematics, which are “aspects of  
4 education (formal and informal) which are required of the worker for satisfactory  
5 job performance.” DOT, Appendix C, Section III. To determine a job’s simplicity  
6 and the reasoning level required, one should look to the GED reasoning level  
7 ratings for the job listed in the DOT. *Meissl v. Barnhart*, 403 F. Supp. 2d 981, 983  
8 (C.D. Cal. 2005). A job’s reasoning level “gauges the minimal ability a worker  
9 needs to complete the job’s tasks themselves.” *Id.*

10 A review of the reasoning level associated with the job of mail clerk  
11 supports the conclusion that there is an apparent conflict in this case. Plaintiff’s  
12 RFC precluded her from complex tasks. AR at 27. For lack of any clearer  
13 articulation of her RFC, the court presumes that plaintiff is limited to simple tasks.  
14 The DOT classifies the job of mail clerk as having reasoning level three. DOT  
15 209.687-026. Level three reasoning assumes a person can “[a]pply commonsense  
16 understanding to carry out instructions furnished in written, oral, or diagrammatic  
17 form [and] [d]eal with problems involving several concrete variables in or from  
18 standardized situations.” *See id.*; DOT, App. C. The Ninth Circuit recently held  
19 that “there is an apparent conflict between the residual functional capacity to  
20 perform simple, repetitive tasks, and the demands of Level 3 Reasoning.” *Zavalin*  
21 *v. Colvin*, 778 F.3d 842, 847 (9th Cir. 2015).<sup>6</sup>

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23 <sup>6</sup> Although *Zavalin* was not issued until after the ALJ’s decision, case law  
24 prior to it also suggests there was an apparent conflict. There is a split among the  
25 circuit courts as to whether the limitation to simple tasks is compatible with a  
26 reasoning level of three. *Compare Terry v. Astrue*, 580 F.3d 471, 478 (7th Cir.  
27 2009) (a claimant limited to “simple” work could perform a reasoning level three  
28 job); *Renfrow v. Astrue*, 496 F.3d 918, 920-21 (8th Cir. 2007) (a claimant with an  
inability to do “complex technical work” was not precluded from unskilled jobs  
with a reasoning level of three), and *Hackett v. Barnhart*, 395 F.3d 1168, 1176

1 Here, the VE testified that there was no conflict. AR at 68. Had the ALJ  
 2 simply accepted the VE's testimony, there would have been error because, on its  
 3 face, reasoning level three is inconsistent with an individual limited to simple  
 4 tasks. Upon further inquiry, however, the VE explained that the job of mail clerk  
 5 involved simple, repetitive, non-complex tasks, primarily consisting of sorting  
 6 incoming mail and delivering it within the office. AR at 69, 72. In other words,  
 7 despite the DOT classification of the job as having reasoning level three, the VE's  
 8 testimony constituted substantial evidence that the job actually only entails simple  
 9 tasks. Therefore, there was no error.

10 Accordingly, the jobs of electronics worker and mail clerk, as identified and  
 11 described by the VE, did not exceed plaintiff's non-exertional limitations.

12 **B. The ALJ Did Not Err at Step Five With Respect to Plaintiff's**  
 13 **Exertional Limitations**

14 Plaintiff contends that the ALJ erred at step five because he failed to  
 15 identify and explain the conflict between the VE's testimony and the DOT with  
 16 respect to plaintiff's standing and walking limitation. P. Mem. at 14-15.  
 17 Specifically, plaintiff argues that because the jobs of mail clerk and electronics  
 18 worker are classified as light work, they require the ability to stand and walk for  
 19 six hours in an eight-hour work day, which exceeded her RFC of standing and  
 20 walking no more than two hours in an eight-hour workday. *Id.*

21 \_\_\_\_\_  
 22 (10th Cir. 2005) (limitation to simple and routine tasks is inconsistent with level-  
 23 three reasoning). But among the Ninth Circuit's district courts that addressed this  
 24 issue prior to *Zavalin*, they consistently held that a limitation to simple, routine  
 25 tasks is consistent with reasoning level two jobs but incompatible with reasoning  
 26 level three jobs. *See, e.g., Salas v. Astrue*, 2011 WL 2620370, at \*7 (E.D. Cal.  
 27 June 29, 2011); *Bagshaw v. Astrue*, 2010 WL 256544, at \*5 (C.D. Cal. Jan. 20,  
 28 2010); *Vasquez v. Astrue*, 2009 WL 3672519, at \*3-\*4 (C.D. Cal. Oct. 30, 2009)  
 (agreeing that reasoning level three "might conflict" with a limitation to simple,  
 routine tasks).

1 Here, plaintiff misconstrues the regulations. Light work is defined as work that:  
2 involves lifting no more than 20 pounds at a time with frequent lifting  
3 or carrying of objects weighing up to 10 pounds. Even though the  
4 weight lifted may be very little, a job is in this category when it  
5 requires a good deal of walking or standing, or when it involves  
6 sitting most of the time with some pushing and pulling of arm or leg  
7 controls.

8 20 C.F.R. § 416.967(b); *see* DOT, App. C. Pursuant to SSR 83-10, “the full range  
9 of light work requires standing or walking, off and on, for a total of approximately  
10 [six] hours of an [eight]-hour workday.” Contrary to plaintiff’s assertion, the only  
11 requirement for light work is the ability to lift/carry twenty pounds occasionally  
12 and ten pounds frequently. Jobs classified as light work do not require that a  
13 person stand/walk six hours. Indeed, the definitions reflect that some jobs that  
14 involve mostly sitting may constitute light work.

15 Moreover, the VE here specifically testified that the job of electronics  
16 worker could fall into the sedentary range, and that the job of mail clerk could be  
17 done spending only two hours standing or walking. AR at 67-68. Therefore, from  
18 an exertional standpoint, there was no inconsistency between the DOT and the  
19 VE’s testimony that plaintiff could perform the jobs of electronics worker and mail  
20 clerk.

21 Accordingly, the ALJ did not err at step five. The ALJ properly relied on  
22 the VE’s testimony, and thus substantial evidence supports the ALJ’s step five  
23 finding. There was no conflict between the VE’s testimony and the DOT with  
24 regard to the environmental and standing/walking limitations. As for the  
25 preclusion from complex tasks, the VE explained the deviation.

V.

**CONCLUSION**

IT IS THEREFORE ORDERED that Judgment shall be entered  
AFFIRMING the decision of the Commissioner denying benefits, and dismissing  
this action with prejudice.

DATED: March 31, 2015

A handwritten signature in black ink, appearing to read 'Sheri Pym', written over a horizontal line.

SHERI PYM  
United States Magistrate Judge